

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE RIOS-RAMIREZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

STATEMENT OF JURISDICTION

On January 26, 1966, appellant was indicted, along with three other defendants, in two counts, by the Federal Grand Jury for the Southern District of California, Central Division, for transporting and selling heroin on January 10, 1966, in violation of Title 21, United States Code, Section 174 [C. T. 2]. ^{1/} Following a trial by jury before the Honorable Francis C. Whelan, United States District Judge, from February 17, 1966 to February 25,

^{1/} "C. T. " refers to Clerk's Transcript.

1966, appellant Jose Rios-Ramirez was found guilty of both counts [C. T. 19].

Appellant was convicted and sentenced on March 28, 1966, to the custody of the Attorney General for seven years on each count, the sentences to run concurrently [C. T. 79].

Appellant filed, on April 5, 1966, a Notice of Appeal from the Judgment [C. T. 87].

The District Court had jurisdiction under the provisions of Title 18, United States Code, Section 3231 and Title 21, United States Code, Section 174.

This Court has jurisdiction to review the judgment pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

Title 21, United States Code, Section 174, provides in pertinent part:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States, . . . contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported, or brought into the United States contrary to law . . . shall be imprisoned not less than five or more than twenty years and, in addition,

may be fined not more than \$20,000. "

* * * * *

"Whenever on trial for a violation of this section the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. "

III

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to sustain conviction.
2. Whether the Court erred in admitting the statement of a co-defendant which, by limitation of the court, did not refer to the appellant.
3. Whether the Court in refusing the entrapment instruction offered by another defendant committed plain error as to the appellant who did not offer an entrapment instruction and accepted the charge as given without objection.

IV

STATEMENT OF FACTS

On January 10, 1966, at approximately 5:30 P. M. , Agents Chris V. Saiz and Sergio Borquez, in the company of an informant, entered the Diamond Hotel in Los Angeles, California, and proceeded to room 331 [R. T. 160-63]. ^{2/} Said hotel was located between the United States Courthouse and the Federal Building [R. T. 60-63]. At that time the three met with Andres Ramirez. (Ramirez, a co-defendant of appellant, entered a plea of guilty to Count 2, Sale of heroin [R. T. 181, 784-85].)

Saiz asked "Mr. Ramirez if he had some heroin to sell, and Mr. Ramirez stated that he did and would sell Agent Saiz some heroin . . . but that his partners who had the heroin with them were not there" [R. T. 182]. Ramirez stated he had three partners and arrangements were made to meet again at 9:30 P. M. [R. T. 183]. Ramirez assured the agents that his three partners would be there at 9:30 with an ounce of heroin for each agent [R. T. 186-87].

At approximately 9:40 P. M. on January 10, 1966, Borquez and Saiz went to room 331 where they were introduced by Ramirez to appellant, Lillian Moya-Manzano, a co-defendant and Jesus Rodriguez, a co-defendant [R. T. 164-65], as his three partners [R. T. 200].

^{2/} "R. T. " refers to Reporter's Transcript.

Ramirez stated that appellant was the man with whom Saiz should discuss the sale [R. T. 282]. Appellant stated he had the heroin available. Appellant was asked how good the heroin was and Rodriguez stated that it was "very good heroin, that it was exceptional quality, and that it could be cut six or seven times . . ." [R. T. 285]. When Saiz stated he wanted one ounce, appellant told Manzano to get it and gave her a key [R. T. 285, 573]. Manzano left the room [R. T. 285].

Rodriguez stated in appellant's presence that he had talked with his source of supply in Tijuana that day and that the source stated the subject heroin could be cut six or seven times because of its good quality [R. T. 207]. In fact, the substance delivered was 24.9% heroin hydrochloride [Stipulation of Fact, C. T. 13].

At various times all four defendants stated that it was good quality heroin [R. T. 215]. While Moya was still out of the room, appellant stated the heroin would cost \$550 [R. T. 286]. At the same time Rodriguez stated he brought the heroin directly from Mexico [R. T. 287].

When Moya returned to the room she handed appellant a rubber contraceptive containing the brown powder referred to in the Stipulation as 23.660 grams of heroin [R. T. 288].

Once appellant had the heroin he asked for \$550 [R. T. 293]. When Agent Saiz stated he only had \$400, appellant insisted upon \$550 [R. T. 293]. Rodriguez stated that "two spoons" should be taken out [R. T. 293]. Both agents asked appellant if they could have the heroin on consignment until the next day [R. T. 293]. After

prodding by appellant's co-defendants, appellant agreed to let the agents have the heroin for \$400 that night if they would return the next day with the remaining \$150 [R. T. 293-94].

At that point Agent Saiz handed appellant \$400 who in turn handed Saiz Exhibit One in evidence [R. T. 294].

Appellant and his co-defendants were then arrested by agents of the Federal Bureau of Narcotics at approximately 10:00 o'clock P. M. that night [R. T. 217].

At the time of the arrest appellant threw on the floor the currency previously handed him by Saiz [R. T. 331, 179]. The serial numbers of the retrieved bills matched those of the bills handed Rios by Saiz [R. T. 433-34].

Appellant testified that he did not knowingly receive, and conceal, or sell any heroin to agents Borquez or Saiz [R. T. 541]. "Andres [Ramirez] never gave me the least idea that he was making that kind of business." [R. T. 541].

V

ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN CONVICTION.

The evidence, as shown by the Statement of Facts, provides ample proof for conviction. Suffice it to say, appellant's possession of the heroin "is sufficient for conviction". Aside from the statutory presumption, one of appellant's co-defendants stated, in appellant's



presence, that he brought the heroin directly from Mexico [R. T. 287].

The Ninth Circuit needs no reminder that it is not for an appellate court to weigh the evidence or to determine the credibility of witnesses. A verdict of conviction must be sustained if, taking the view most favorable to the Government, there is substantial evidence to support it.

Glasser v. United States, 315 U.S. 60, 80 (1942);

Nye & Nissen v. United States, 168 F.2d 846

(9th Cir. 1948), aff'd, 336 U.S. 613 (1949).

Appellant's argument on appeal as to sufficiency of the evidence is based solely on the appellant's testimony as related to the trial court; and completely disregards the evidence favorable to the government and the test of sufficiency to be applied on appeal.

B. THE CO-DEFENDANTS POST ARREST
STATEMENTS WERE THE RESULT OF
A PROPER CONSTITUTIONAL WARNING
AND WERE NOT ADMITTED AGAINST
APPELLANT.

Appellant raises the point that under Miranda v. Arizona, 384 U.S. 436 (1966), co-defendant Moya-Manzano was not advised of her right to have a court-appointed attorney present during any questioning. Aside from the fact that the case was tried between February 17 and 25, 1966 and that Miranda is not retroactive, Moya-Manzano was advised "that she had the right to have an attorney . . ." [R. T. 307]. The trial court, at R. T. 327 and R. T.

330 found that such admonition was given, found that her constitutional rights were not violated and admitted a limited portion of what she had told the agent, excluding all reference to appellant. There is no citation of any objection to the admission of her admissions as limited. In fact, appellant waived any objection he might have by virtue of his questioning Moya-Manzano with respect to said post-arrest statements [R. T. 586-88].

C. THERE WAS NO PREJUDICIAL ERROR
 TO THIS APPELLANT BY THE TRIAL
 COURT'S REFUSAL TO GIVE AN
 ENTRAPMENT INSTRUCTION REQUESTED
 BY A CO-DEFENDANT.

Although appellant's opening brief states, "The Court Committed Prejudicial Error In Refusing Defendant's Instruction on Entrapment", no citation is made to the instructions refused, or the part referred to totidem verbis, in violation of Rule 18 of the Ninth Circuit.

Appellant did not offer any instruction pertaining to entrapment [C. T. 47-50]. Following the charge to the jury, the following colloquy took place at R. T. 742:

"THE COURT: Does anyone have any objection to the charge as given?

"MR. TARLOW: No, not for Rios."

If there had been any request for such an instruction by Rios, it would certainly have been waived by counsel.

Factually, appellant did not claim to have been entrapped. Appellant testified that he had no plans to sell heroin [R. T. 529], did not knowingly receive and conceal heroin [R. T. 541], did not sell any heroin to agents Saiz or Borquez [R. T. 541], and "Andres never gave me the least idea that he was making that kind of business" [R. T. 541].

Assuming appellant had standing to object to the court's refusal to charge the jury on entrapment as requested by co-defendant Rodriguez, this Court should uphold the trial court's ruling. The Ninth Circuit in Ortiz v. United States, 358 F.2d 107, 108 (9th Cir. 1966), stated:

"This court has many times held that where a defendant denies the commission of a crime, he is not entitled to the defense of entrapment. "

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Ronald S. Morrow
RONALD S. MORROW

